

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	CASE NO. 02-81376-JB
	:	
CLEVELAND LOUIS THOMPSON,	:	
	:	
Debtor.	:	CHAPTER 13
<hr style="width:50%; margin-left:0"/>	:	
CLEVELAND LOUIS THOMPSON,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 04-9037
v.	:	
	:	
SAXON MORTGAGE, INC.,	:	
	:	
Defendant.	:	

ORDER

The parties in this adversary proceeding filed cross motions for summary judgment, and following a hearing on these motions, the Court ruled on the record and entered an Order on January 4, 2005. The Order addressed most of the legal issues raised in the motions, but identified two issues of fact that remained to be tried and two issues of law that remained to be briefed. The parties filed supplemental briefs on the legal issues, and the Court gives the following direction:

1. The assignment from Defendant Saxon Mortgage, Inc. (“Saxon Mortgage”) to Bankers Trust Company on the day of the closing does not by itself trigger an extended three-year rescission period under the Truth in Lending Act (“TILA”) as long as the loan proceeds were not disbursed within the three-day rescission period. Actions allowed during the delay period set out in 12 C.F.R. pt. 226, supp. 1, ¶23(c)(3) include the language “Prepare to discount or assign the contract to a third party.” As long as the loan proceeds were not prematurely disbursed, had

plaintiff exercised the right of rescission within the three-day period, the transaction could have been rescinded and cancelled.

2. Contrary to Defendant Saxon Mortgage's argument, an assignment does not terminate the right of rescission under TILA against the original lender as a matter of law. The language of the statute, the regulations and common sense preclude this reading. *See* 15 U.S.C. §§ 1602(f), 1635(a) (2005); 12 C.F.R. §§ 226.2(a)(17), 226.23(a)(2) (2005); 12 C.F.R. pt. 226, supp. 1, ¶ 2(a)(17)(i)(2) (2005). If Defendant were correct, the right of rescission against the original lender in most residential loans would be terminated, as mortgages are commonly assigned.

3. The question in this adversary proceeding will be whether the Court can practically fashion an equitable remedy, if appropriate, given the fact that plaintiff did not join the current holder of the note and security deed as a defendant. Saxon Mortgage represents that Deutsche Bank holds the note and security deed, but the recorded assignment on March 14, 2001, shows "Bankers Trust Company, as Custodian" as the assignee from the Defendant. A proof of claim was filed in this case on December 16, 2002, under the name of Saxon Mortgage Services, Inc., and a motion for relief from the automatic stay filed on May 6, 2003, stated that Saxon Mortgage Services, Inc. is the creditor. However, before the Court considers whether or how an equitable remedy can be fashioned against Saxon Mortgage, Inc., the only named defendant in this adversary proceeding, the trial needs to be held to determine if there actually was a violation of the Truth in Lending Act. Only if there is a violation do we reach the question of whether a rescission remedy can be fashioned against the named defendant in this proceeding.

The trial on the remaining factual issues will be scheduled by separate Order.

IT IS SO ORDERED, this ____ day of March, 2005.

JOYCE BIHARY
UNITED STATES BANKRUPTCY COURT

CERTIFICATE OF MAILING

Dwight Bowen, Esq.
170 Mitchell Street, SW
Atlanta, GA 30303

Lawrence W. Kelly, Esq.
Morris, Schneider & Prior, LLC
1587 N.E. Expressway
Atlanta, GA 30329

Judicial Assistant to Judge Bihary

Date: _____

Randall M. Smith
406 Carriage Place Court
Decatur, GA 30033